Supreme Court, U. S.
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IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1979

No. 79-1724

MARY C. L. YEH,

Petitioner,

vs.

SYSTEM DEVELOPMENT CORPORATION,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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IN THE

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October Term, 1979

No.

MARY C. L. YEH,

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vs.

SYSTEM DEVELOPMENT CORPORATION,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

Petitioner, Mary C. L. Yeh, prays that a writ of certiorari will be issued to review the judgment of the United States Court of Appeals for the Ninth Circuit entered in this case on February 8, 1980 and the order of the United States District Court for the Central District of California entered in this case on January 25, 1978.

OPINIONS BELOW

The decision of the Court of Appeals and the denial of rehearing are reproduced herein as Appendices A and B, respectively. The memorandum and order granting summary judgment of the District Court is reproduced herein as Appendix C.

JURISDICTION

The judgment of the U.S. Court of Appeals was entered on February 8, 1980. A timely filed petition for rehearing was denied on March 31, 1980. This Court's jurisdiction is invoked under 28 U.S. C. Sec. 1254(1).

QUESTIONS PRESENTED

1. Whether a reviewing court in affirming the judgment of the court below errs by relying its decision on the evidence which has been presented neither in the trial court nor during the hearing of appeal.

2. Whether a court may grant summary judgment when moving party's affidavits are not based upon

personal knowledge, inadmissible in evidence and conclusory while the evidence presented by the opposing party sets forth specific facts and is based upon personal knowledge.

3. Whether a court may grant summary judgment when conflicting pictures are presented and genuine issues are intrinsically embedded even in the moving party's own affidavits.

4. Whether a reviewing court in affirming the judgment of a lower court errs by accepting the lower court's conclusion without sufficient facts to undergird the ultimate finding.

5. Whether a court may impose very rigidly upon an employee to satisfy the same specific elements when establishing a prima facie showing in all the Title VII employment discrimination cases.

6. Whether a court may overlook disparate treatment presented by the employee in a specific factual fashion when establishing a prima facies case in a Title VII employment discrimination case.

7. Whether a court may overlook the fact that

employer fails to explain its own discriminatory actions presented by the employee in specific factual form in a Title VII employment discrimination case.

8. Whether an employee has to rebut employer's reasons for her discharge when the employer's affidavits contain only conclusory statements with no specific facts in a Title VII employment discrimination case.

STATUTORY PROVISIONS AND RULES INVOLVED

The statutory provisions involved are relevant portions of the Civil Rights Act of 1964, as amended, 42 U.S.C. Sec. 2000e et seq. This case also involves the relevant portions of Rule 56 of Federal Rules of Civil Procedure on summary judgment. They are reproduced in Appendix D.

STATEMENT OF THE CASE

Petitioner, Yeh, a naturalized citizen of Taiwan Chinese origin was terminated from her job with Respondent, System Development Corporation (SDC) on June 1, 1976. On or about June 12, 1976, Yeh

filed a charge of employment discrimination against SDC because of her national origin with the California Fair Employment Practice Commission (FEPC). On or about September 7, FEPC terminated its proceedings on the charge. On or about June 22, 1976, Yeh filed a charge with Equal Employment Opportunity Commission (EEOC). Yeh received a Notice of Right to Sue on or about April 18, 1977 from EEOC.

A Civil suit was filed with the U.S. District Court for the Central District of California on July 14, 1977. The jurisdiction of the District Court is invoked upon 42 U.S.C. Sec. 2000e et seq. SDC moved for summary judgment and the motion was granted for SDC on January 26, 1978. Yeh filed a timely "Notice of Appeal" with the District Court and the Ninth Circuit affirmed the District Court's decision on Febrary 8, 1980. A timely filed petition for rehearing was denied on March 31, 1980.

Yeh was employed by SDC from on or about October 13, 1975 through June 1, 1976 as a Senior Human Factor Analyst. The fact that Yeh was terminated from her job was predetermined. Shortly after she

started her job, her immediate supervisor, Dr. Wellisch told her that she would not work on Sustaining Effect Study, the project for which she was hired and that it was a mistake that she was hired.

Ever since joining SDC, Yeh had problem getting assignment. According to Dr. Wellisch, the reason why she was not assigned was that all what Yeh could do other people could also do. And she ought to ask people if they needed her help. But all other professionals received their assignments from their supervisors.

Yeh was not provided with materials and information to work with. And the assignment given to her was not up to her level of qualification and position. She was also given highly detailed and structured outline for her assignment. That made her job mechanical and impeded her flexibility in work. It was very hard if not impossible to carry out such a rigid plan imposed on her by Dr. Wellisch.

Yeh was sometimes harrassed by her supervisor. Once she took a sick leave for two days. When she

went back to her office, Dr. Wellisch yelled in a hostile fashion, "Who knows if you are living or dead?" Yeh was the only one that she knows of, who was harrassed because she was sick.

Yeh carried out all her assignments but never received any feedback from her immediate supervisor, Dr. Wellisch regarding her work products during her employment and even after she was told that she would be terminated. Dr. Wellisch did not critize her performance in the office either. She received positive feedback with regard to her work products from other people and was never told that she had poor work product.

Yeh was terminated without any warnings. Upon receiving advanced notice of termination, she went through SDC grievance review. The review found that the reasons for her termination were: Yeh's ccmmunication problem in both oral and written forms, her inflexibility in approach to tasks and her extreme need for structure in the assignment of tasks. Yeh was told that she was laid off because of lack of suitable work for her. At that time there was

no work slow down and no body else was laid off.

Despite Yeh's preponderance of evidence, SDC moved for summary judgment. When presenting evidence, Yeh enumerated specific factual episodes. But SDC completely ignored the evidence presented by her. The affidavits supporting SDC's motion for summary judgment were hearsay, conclusory and were contradictory among themselves. Yeh also clearly demonstrated the genuine issues which were intrinsically embedded in SDC's own affidavits. She also challenged the credibility of those affiants who were SDC's current or former employees.

Notwithstanding the above, the District Court completely ignored Yeh's evidence and argument and granted summary judgment for SDC. The reasons given were that Yeh had failed to present a prima facie case of discrimination; that she had clearly not met her burden of refuting the testimony; and that no genuine issues of material fact remained.

On appeal, the Ninth Circuit affirmed the District Court's decision and conclusorily stated:

"We are satisfied that the record contains no genuine issue over the fact that SDC's motivation for discharging Yeh was because of her poor work performance, and not because of her national origin."

REASONS FOR GRANTING THE PETITION FOR WRIT OF CERTIORARI

I. The Decisions of the Ninth Circuit And the District Court Conflict with Decisions of This Court And Other Circuit Courts as to the Scope of Review on Appeal And the Nature of Summary Judgment.

A. Judgment Based upon New Evidence And Its Conflict with Dothard.

The Circuit Judge stated, "... SDC also supplied undisputed evidence of its past good representation and fair treatment of minorities in its employment ..." Yeh was not even aware of such evidence. It is unfair for the court to consider a material point without giving her a chance to examine and to argue the same.

Evidence which is not raised in the trial court can not be raised on appeal. The Supreme Court in

Dothard v. Rawlinson, 97 S. Ct. 2720, 433 U.S. 321, (1977), stated, "Appellants, in order to rebut the prima facie case under the statute, had the burden placed on them to advance job-related reasons.... This burden could be shouldered by offering evidence or by making legal arguments not dependent on any new evidence." Id., 97 S.Ct. at 2732. On the same page, it was also stated, "...Because of this burden, a reviewing court is not ordinarily justified in relying on arguments ... that were not presented to the trial court."

In this case, the Ninth Circuit based its judgment on the evidence which had been neither included in the record nor raised in the District Court nor mentioned during the hearing of appeal. And that conflicted with this Court's holding in Dothard.

B. Conclusory Evidence in Summary Judgment And Its Violation of Rule 56(e) of Federal Rules of Civil Procedure.

Yeh presented preponderance of evidence by

elaborating specific facts (i.e., exactly what happened, when, where and the persons involved.) On the other hand, the affidavits filed by SDC in supporting summary judgment gave no specific facts and they were hearsay, conclusory and inadmissible in evidence (e.g., I was personally told, I strongly believed, I personnally experienced, etc.) SDC's evidence violated Rule 56(e) of Federal Rules of Civil Procedure:

> "Supporting and opposing affidavits shall be made on personal knowledge, shall set forth such facts as would be admissible in evidence and shall show affirmatively that the affiant is competent to testify to the matters stated therein ..."

In addition, most statements made by SDC were not true. Since summary judgment is not to resolve ultimate factual issues, Yeh has reserved the right to litigate during the trial.

However, both SDC and the District Court completely ignored Yeh's evidence. The Ninth Circuit partially realized Yeh's picture but did not show how it disposed her evidence. And summary judgment was granted for SDC.

This ruling conflicted with the Supreme Court in Blackledge v. Allison, 97 S. Ct. 1621, 431 U.S. 63 (1977). In that case, the Supreme Court reversed the order granting summary judgment because Allison a pro se, elaborated with specific factual allegations. This Court stated, "... The petitioner indicated exactly what ... when, where, and by whom ... we conclude that Allison's petition should not have been summarily dismissed." Id., 97 S. Ct. at 1630.

C. Existence of Genuine Issues And Its Violation of Rule 56(c) of Federal Rules of Civil Procedure.

Rule 56(c) of Fed. Rule Civ. Proc. stated, "... The judgment sought shall be rendered forthwith ... if any, show there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law ..."

Yeh challenged the credibility of SDC's affiants by pointing out the contradiction among themselves and those genuine issues intrinsically embedded in

their own affidavits. These issues were presented under "Statement of Genuine Issues" in the record and were argued during the hearings. The Circuit Court even portrayed the conflicting claims made by both sides as:

> "The evidentiary record portrays Yeh's claims as being underrated job-wise in that the supervisors refused to assign her enough work, or work which was up to her level of qualification; that she was not provided with materials with which to work; that she was never told her work was unsatisfactory; and that she had no communication problems with co-workers. On the other hand, SDC pictures Yeh's work performance as poor, and that she was inflexible and unable to satisfactorily complete an assigned task."

Notwithstanding the above, both the District Court and the Ninth Circuit concluded that there was no genuine issue but did not explain why those genuine issues did not exist and how they resolved those conflicting claims.

In Bishop v. Wood, 96 S. Ct. 2074, 426 U.S. 349 (1976), this Court stated, "In our appraisal of petitioner's claim, we must accept his version of the facts since the District Court granted summary judgment against him ... " Id., at 2079. On the

same page, note 11 stated, "In granting summary judgment for respondents, the District Court was required to resolve all genuine disputes as to material facts in favor of petitioner. Fed. Rule of Civ. Proc. 56(c); Arnett v. Kennedy, supra 416 U.S. at 139-140, 94 S. Ct. at 1637, 40 L. Ed 2d 15." Apparently, the summary judgment rendered by the Courts below in this case conflicted with the Supreme Court's decision in Bishop and violated Rule 56(c).

D. Conclusory Judgment And Its Conflict with Parson

Both the District Court and the Court of Appeals ruled that summary judgment should be granted because there were no genuine issues of material facts and SDC terminated Yeh not because of discrimination. But they did not explain why the genuine issues did not exist and on what basis they reached the conclusion that SDC did not discriminate against Yeh.

In Parson v. Kaiser Aluminum & Chemical Corp., et al., 575 F. 2d, 1374 (1978), the Fifth Circuit

remanded the case because:

> "the District Court Judge offered no hints as to the basis for his finding ... We are simply unable to determine whether Judge found sufficient subsidiary facts to undergird the ultimate finding ... It is therefore necessary for us to reverse the dismissal of Parson's claim and remand for an articulation of the basis for the Judg's conclusion ..." Id., at 1383.

Apparently, in this case, the Ninth Circuit was inconsistent with the Fifth Circuit's decision in Parson.

II. The Decisions of the Ninth Circuit And District Court Conflict with Decisions of This Court And Other Circuit Courts as to the Proper Construction of the Civil Rights Act.

The Ninth Circuit stated:

> "The District Court granted summary judgment for SDC on two grounds: Yeh's failure to make out a prima facie case, and her failure to rebut SDC's showing of legitimate reasons for her discharge. We affirm."

And note 1 stated:

> "We do not decide whether Yeh presented a prima facie case under the rationale of Flowers v. Crouch-Walker Corp., 552 F. 2d 1277 (7th Cir., 1977). Rather we review the entire evidentiary record."

A. Rigid Approach in Establishing a Prima Facie Case And Its Inconsistency with Flower, Furnco, McDonnell and Teamster.

The District Court granted summary judgment because Yeh failed to satisfy the specific elements when establishing a prima facie case under the McDonnell Douglas and Flower standard. According to McDonnell Douglas v. Green, 93 S. Ct. 1817, 411 U.S. 792 (1973), in proving a Title VII employment discrimination case, the plaintiff has to establish a prima facie case. The defendant has to rebut the prima facie case by articulating legitimate reasons for his action. Then, the plaintiff has to show that these reasons are only pretext for their discriminatory actions. Foot note 13 stated:

> "The facts necessarily will vary in Title VII cases, and the specification above of the prima facie proof required from respondent is not necessarily applicable in every respect to differing factual situations." Id., 411 U.S. at 802.

The fact that the District Court ruled Yeh had to follow the specific factors when establishing a prima facie case is apparently inconsistent with

McDonnell Douglas.

More recent Supreme Court cases, Internationl Brotherhood of Teamsters v. United States et al., 97 S. Ct. 1843, 431 U.S. 324 (1977) and Furnco Construction Corporation v. Waters et al., 98 S. Ct. 2943, 438 U.S. 567 (1978) clarified that standard set up in McDonnell Douglas is not inflexible. Prima facie case is only an orderly way to evaluate the evidence in light of common experience as it bears on the critical question of discrimination.

Even if Yeh had to prove a prima facie case by following McDonnell Douglas and all the five factors specified in Flower v. Crouch-Walker Corp., 552 F. 2d 1277 (7th Cir., 1977), she still did satisfy exactly those factors. The District Court accused Yeh of failing to establish two out of the five factors in Flower: 1. She was satisfying the normal requirements of her position, and 2. that employer assigned white employees to perform the same work after her discharge.

Flower stated:

> "However, the plaintiff need not, and indeed cannot, disprove as a cause of his discharge a source of dissatisfaction of which he is unaware. Accordingly, the employer's acceptance of his work without express reservation is sufficient to show that the plaintiff was performing satisfactorily for the purpose of shifting the burden of proof." Id., 552 F. 2d at 1283.

In this instant case, Yeh's products were accepted without any feedback from her immediate supervisor and got positive feedback from others.

In addition, SDC assigned white employees to perform the work not only after her discharge but also during her employment. Therefore, District Court erred in ruling that Yeh failed to satisfy the specific elements set up in Flower when establishing a prima facie case. Since the Ninth Circuit didn't decide under the rationale of Flower, apparently, it did not even try to be consistent with the Seventh Circuit's decision in Flower.

B. Ignoring Disparate Treatment And Its Violation of 42 U.S.C. Sec. 2000e et seq.

Section 2000e-2(a)(1) of 42 U.S.C. stated:

> "It shall be an unlawful employment practice for an employer ... to discharge any individual or otherwise to discriminate against any

> individual with respect to his compensation, terms, conditions, or privileges of employment because of such individual's ... national origin."

In this instant case, Yeh enumerated preponderance of evidence in terms of disparate treatment which is the core of Title VII cases and is one way to establish a prima facie case.

In Teamster, the Supreme Court stated:

> "Disparate treatment ... is the most easily understood type of discrimination. The employer simply treats some people less favorably than others because of their ... national origin. Proof of discriminatory motive is critical, although it in some situations can be inferred from the mere fact of difference in treatment ... Undoubtly, disparate treatment was the most obvious evil Congress had in mind when it enacted Title VII." Id., 431 U.S. at 335, N.15.

The Supreme Court in Furnco also indicated:

> "The central focus of the inquiry ... is always whether the employer is treating 'some people less favorably than others' because of their , .. national origin." Id., 98 S. Ct. at 2949.

In this case, the Courts below, by ignoring these disparate treatments, granted summary judgment. And that conflicted with the Supreme Court in Furnco and Teamster and violated the statute.

C. Failure to Explain Specific Discriminatory Actions And Its Conflict with Furnco, McDonnell And Teamster.

According to McDonnell Douglas, the defendant has the burden to rebut plaintiff's prima facie case by articulating some legitimate reasons for his actions. However, SDC completely ignored the evidence presented by Yeh. Instead, it articulated some other pretexts which did not explain its own discriminatory actions in Yeh's prima facie case.

The Supreme Court in Teamsters stated:

> "If an employer fails to rebut the inference that arises from a prima facie case, a trial court may then conclude that a violation has occurred and determine the appropriate remedy." Id., 431 U.S. at 361.

And in Furnco, this Court clarified:

> "... But McDonnell Douglas did make clear that a Title VII plaintiff carries the initial burden of showing actions taken by the employer from which one can infer, if such actions remain unexplained, that it is more likely than not that such actions were based on a discriminatory criterion illegal under the Act." Id., 98 S. Ct. at 2949.

In this case, the Courts below completely ignored this important point. That contradicted this Court.

D. Need to Rebut Conclusory Affidavits And Its Conflict with Doff.

Both the District Court and the Court of Appeals not only didn't rule against SDC for not rebutting Yeh's prima facie, but also accused Yeh of failing to rebut SDC's showing of legitimate reasons for her discharge.

That conflicted with Doff v. Brunswick Corp., 372 F. 2d 801 (9th Cir., 1967) based upon which the Court pf Alleals reached its decision in this case. It was stated in Doff, "... did not have burden of proving invalidity of defense ... where ... affidavits did not contain sufficient specific facts to raise such defense on motion for summary judgment." Id., at 802.

In this case, Yeh did show that SDC's reasons did not explain its own discriminatory actions presented by Yeh and they were only pretexts which had discriminatory implications. According to Doff, Yeh did not even have the burden to rebut where SDC's affidavits did not contain any specific

facts. Therefore, the Ninth Circuit conflicted with its own holding in Doff.

CONCLUSION

The fact that Ninth Circuit based its judgment upon new evidence not presented in the District Court conflicts with this Court's ruling in Dothard. The fact that Courts below ignored that the evidence presented by SDC was inadmissible and conclusory while Yeh's evidence contained the specifics violates Rule 56(e) of Fed. Rule Civ. Proc. and conflicts with Supreme Court's decision in Blackledge. The fact Courts below overlooked the existing genuine issues and granted summary judgment for SDC violates 56(c) of Fed. Rule Civ. Proc. and conflicts with the Supreme court in Bishop. The fact that Courts below reached their conclusory judgment without specifying the basis of their findings is inconsistent with the decision of the Fifth Circuit in Parson.

The facts that Courts below accused Yeh's failure to satisfy the specific elements under McDonnell

and Flower in a prima facie showing of a Title VII case; that Yeh did demonstrate that she indeed satisfied exactly those elements; and that those elements should not be inflexible and should vary under different factual situations conflict with Flower, Furnco, McDonnell and Teamster. The fact that Courts below ignored the disparate treatments in a Title VII employment discrimination case violates 42 U.S.C. Sec. 2000e-2(a)(1) and contradicts Furnco and Teamster. The facts that SDC did not explain any of its discriminatory actions presented by Yeh in specific factual forms; and that Courts below completely overlooked this point conflict with Furnco and Teamster. The facts that Courts below accused Yeh of failing to rebut SDC's legitimate reasons which did not explain its own discriminatory actions presented by Yeh; that Yeh did indeed demonstrate they were merely pretexts; and that Yeh did not have the burden to rebut SDC's affidavits containing no specific facts conflict with the Ninth Circuit's own decision in Doff.

For the reasons above, a writ of certiorari should be issued to review the judgment of U. S. Court of Appeals for the Ninth Circuit and the order of the U. S. District Court for the Central Dsitrict of California in this case. ///

Respectfully submitted,

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APPENDIX A

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

MARY C. L. YEH, Plaintiff-Appellant, vs. SYSTEM DEVELOPMENT CORPORATION, Defendant-Appellee.	No. 78-1752 MEMORANDUM February 8, 1980 Filed

Appeal from the United States District Court

For the Central District of California

Before: GOODWIN and SCHROEDER, Circuit Judges, and EAST,* District Judge

Yeh, a naturalized citizen of Taiwan-Chinese origin, was discharged from her job with the defendant-appellee System Development Corp. (SDC). She claims she was discriminatorily discharged on the basis of national origin, and SDC claims Yeh was discharged for poor work performance.

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*Honorable William G. East, Senior United States District Judge for the District of Oregon, sitting by designation.

The District Court granted SDC's motion for summary judgment on two grounds: Yeh's failure to make out a prima facie case, and her failure to rebut SDC's showing of legitimate reasons for her discharge. We affirm. 1/

The evidentiary record portrays Yeh's claims as being underrated job-wise in that the supervisors refused to assign her enough work, or work which was up to her level of qualification; that she was not provided with materials with which to work; that she was never told her work was unsatisfactory; and that she had no communication problems with co-workers. On the other hand, SDC pictures Yeh's work performance as poor, and that she was inflexible and unable to satisfactorily complete an assigned task. SDC also supplied undisputed evidence of its past good representation and fair treatment of minorities in its employment.

1/ We do not decide whether Yeh presented a prima facie case under the rationale of Flowers v Crouch-Walker Corp., 552 F. 2d 1277 (7th Cir. 1977). Rather we review the entire evidentiary record.

We are satisfied that the record contains no genuine issue over the fact that SDC's motivation for discharging Yeh was because of her poor work performance, and not because of her national origin. Thus, she has no right to relief under Title VII. 42 U.S.C. Sec 2000e-(g). McDonnell Douglas Corp. v. Green, 411 U.S. 792 (1973); Doff v. Brunswick Corp., 372 F. 2d 801 (9th Cir.), cert. denied, 389 U.S. 820 (1967); Stansifer v. Chrysler Motors Corp., 487 F. 2d 59 (9th Cir. 1973); and Lim v. Citizens Savings and Loan Assoc., 430 F. Supp. 802 (N.D. Cal. 1976).

The summary judgment entered by the District Court on January 26, 1978 is affirmed.

AFFIRMED.

APPENDIX B

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

MARY C. L. YEH, Plaintiff-Appellant, vs. SYSTEM DEVELOPMENT CORPORATION, Defendant-Appellee.	No. 78-1752 ORDER March 31, 1980 Filed

Appeal from the United States District Court
For the Central District of California

Before: GOODWIN and SCHROEDER, Circuit Judges, and EAST,* District Judge

The appellant's petition for rehearing is denied, except that the statute reading 42 U.S.C. Sec. 2000e-(g) appearing in line 11 on page 2 of the Memorandum is deleted and the following is substituted therefor: 42 U.S.C.Sections 2000e - 2000e-17 (Memorandum filed February 8, 1980).

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*Honorable William G. East, Senior United States District Judge for the District of Oregon, sitting by designation.

APPENDIX C

UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

MARY C. L. YEH, Plaintiff, vs. SYSTEM DEVELOPMENT CORPORATION, Defendant.	Civil No. 77-2592-HP MEMORANDUM AND ORDER GRANTING SUMMARY JUDGMENT January 25, 1978 Filed

Plaintiff, Mary C. L. Yeh, formerly employed by defendant, System Development Corporation (SDC), charges that SDC discriminated against her because of her race when it terminated her employment as a Senior Human Factors Analyst. She has brought this action under Title VII of the Civil Rights Act of 1964, 42 U.S.C. Sec. 2000e et seq. The matter is before this court on defendant's motion for summary judgment, filed December 11, 1977. After considering the pleadings, affidavits, memoranda of law, and oral argument of plaintiff and counsel for defendant on January 9, 1978, the

court concludes that the motion for summary judgment in favor of defendant should be granted.

When a charge of employment discrimination is made, the plaintiff has the initial burden of presenting a prima facie case. McDonnell Douglas Corporation v. Green, 411 U.S. 792, 802. If the plaintiff meets this burden, the employer must then demonstrate legitimate, nondiscriminatory reasons for its actions. Finally, the plaintiff must be allowed to show that the employer's reasons are mere pretenses. Id. at 802-04.

Where an allegedly discriminatory discharge from employment has taken place, a prima facie case of discrimination may be shown by establishing the following factors: "(1) that the plaintiff was a member of a racial minority; (2) that he was qualified for the job he was performing; (3) that he was satisfying the normal requirements in his work; (4) that he was discharged; and (5) that after his discharge the employer assigned white employees to perform the same work." Flowers v. Crouch-Walker Corporation, 552 F. 2d 1277, 1282 (7th Cir. 1977).

Applying these factors to the instant case, the court finds that plaintiff has failed to show that all of these factors exist. Plaintiff is a member of a racial minority, Chinese, who was discharged. She was concededly qualified by education to perform her job of Senior Human Factors Analyst. But plaintiff has made no showing, through affidavit or other evidence, that she was satisfying the normal requirements of her position. Plaintiff, moreover, admitted in an affidavit filed with this court on December 14, 1977, that she was "laid-off by defendant because of a lack of a suitable job position...." Furthermore, since plaintiff's discharge, no one has been hired to fill the position which she vacated. Thus, plaintiff has failed to present a prima facie case of discrimination.

Even if the court were to assume arguendo that a prima facie case had been presented by plaintiff, she has failed to rebut the strong showing made by defendant that plaintiff's discharge was motivated by legitimate, nondiscriminatory business reasons. This showing has been made through affidavits by

each of the current and former SDC employees that plaintiff herself intends to call as witnesses (according to her Pre-Trial Conference Order filed November 14, 1977). Each of these persons indicate that SDC had valid nondiscriminatory reasons for discharging plaintiff: Plaintiff was inflexible in her approach to tasks to be performed; she had an extreme need for structure in the assignment of tasks; and her supervisors had difficulty in communicating with her regarding her assignments, both orally and in writing. Plaintiff has clearly not met her burden of refuting this testimony.

Summary judgment is appropriate when no genuine issue of material fact exists to be litigated. Federal Rule of Civ. Proc. 56(e). It is not sufficient for plaintiff in opposing the motion to rely on her pleadings and submit no evidence to rebut the defendant's demonstration that no material fact exists. Id. Summary judgment was granted under similar circumstances in an employment discrimination case directly in point here, Lim v. Citizens Savings and Loan Association, 430 F. Supp.

802, 806 (N.D. Cal. 1976). In Lim, plaintiff had attempted to make out a prima facie case by relying on her complaint and a conclusory affidavit. No specific in the form of evidence or affidavits were presented to support plaintiff's contentions. The court, after noting that plaintiff had tried, instead of proving her case, to "chip away" at defendant's defensive showing, then concluded that: "Summary judgment is proper where, in a Title VII case, defendant's affidavits clearly indicating absence of discrimination remain substantially uncontroverted or are opposed solely by plaintiff's assertions." Id. at 816. Since the instant case is in virtually the same posture as the Lim case, the same reasoning and holding should be applied here. The court therefore holds that either plaintiff has failed to establish a prima facie case of employment discrimination under the McDonnell Douglas and Flowers standards or defendant has rebutted plaintiff's showing with such an overwhelming demonstration of legitimate reasons for its decision to terminate plaintiff's employment that

no genuine issue of material fact remains.

THEREFORE, IT IS ORDERED that defendant's motion for summary judgment be granted in favor of defendant, but that each side bear its own costs, and that plaintiff not be required to repay her moving costs, which defendant is willing to waive.

The Clerk of the Court shall serve copies of this Order, by United States mail, upon plaintiff and counsel for defendant.

/s/ Harry Pregerson
United States District
Judge

Date: January 25, 1978.

APPENDIX D

Relevant portions of Title VII of the Civil Rights Act of 1964 as amended, 42 U.S.C. Sec. 2000e et seq.

Sec. 2000e - 2. (a) It shall be an unlawful employment practice for an employer -

(1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex or national origin.

Relevant portions of Rule 56 of Federal Rules of Civil Procedure on Summary Judgment.

Rule 56(c). The motion shall be served at least 10 days before the time fixed for the hearing. The adverse party prior to the day of hearing may serve opposing affidavits. The judgment sought shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the

affidavits, if any show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law. A summary judgment, interlocutory in character, may be rendered on the issue of liability alone although there is a genuine issue as to the amount of damages.

Rule 56(e). Supporting and opposing affidavits shall be made on personal knowledge, shall set forth such facts as would be admissible in evidence and shall show affirmatively that the affiant is competent to testify to the matters stated therein. Sworn or certified copies of all papers or parts thereof referred to in an affidavit shall be attached thereto or served therewith. The court may permit affidavits to be supplemented or opposed by depositions, answers to interrogatories, or further affidavits. When a motion for summary judgment is made and supported as as provided in this rule, an adverse party may not rest upon the mere allegations or denials of his pleadings, but his response, by affidavits or as

otherwise provided in this rule, must set forth specific facts showing that there is a genuine issue for tiral. If he does not so respond, summary judgment, if appropriate, shall be entered against him.

Relevant portions of 28 U.S.C. Sec. 1254 on Supreme Court review.

Sec. 1254. Cases in the courts of appeals may be reviewed by Supreme Court by the following methods:

(1) By writ of certiorari granted upon the petition of any party to any civil or criminal case, before or after rendition of judgment or decree.